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No. 518

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MARK WENDELL PAINTER, a Minor, by HAROLD W. PAINTER, his Father and Next Friend, *Petitioner*,

v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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No.

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v.

DWIGHT BANNISTER and MARGARET BANNISTER, Husband and Wife, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner prays that a writ of certiorari issue to review a judgment of the Supreme Court of Iowa entered in a habeas corpus proceeding instituted by him on behalf of his son by which judgment the court deprived him of the custody of his son in favor of the child's maternal grandparents.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa (R. 589-600; App. B, pp. 3a-13a, *infra*) is reported at 140 N.W. 2d 152. The opinion of the trial court, the District Court of Story County, Iowa, (R. 572-83; App. C, pp. 14a-21a, *infra*) is not reported.

JURISDICTION

The judgment of the Supreme Court of Iowa (R. 601; App. D, p. 22a, *infra*) was entered on February 8, 1966. A timely-filed petition for rehearing was denied on June 13, 1966. (R. 938). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether, consistently with the due process clause of the Fourteenth Amendment and other applicable constitutional provisions, a state may deprive a parent of the custody of his child and award such custody to others when it is conceded that the parent is fit and qualified to act as a parent and has not abandoned or otherwise relinquished custody of his child.

2. If a state in any circumstances may deprive a fit parent who has not abandoned or otherwise relinquished custody of his child of such custody and award such custody to others, whether it may do so, consistently with the due process clause of the Fourteenth Amendment and with the First Amendment, on the ground of the parent's political and religious beliefs and expressions.

3. Whether, consistently with the due process clause of the Fourteenth Amendment, a state may deprive a parent of the custody of his child on the basis of no evidence other than the testimony of a psychologist, retained by the persons contesting custody with the parent, who had never professionally seen the parent or his household and whose opinions stated in his testimony are not those of other psychologists and are contrary to human experience and to common sense.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Other constitutional provisions involved and certain Iowa statutes are set out in Appendix A to the petition, pages 1a-2a, *infra*.

STATEMENT

Petitioner, Harold Painter, is the father of an eight-year-old boy named Mark. Mark's mother died in an automobile accident near their home in Pullman, Washington, in December 1962 when Mark was not yet five; Mark's three-year-old sister was also killed. In the emotionally wracking aftermath of the deaths of his wife and daughter Harold Painter returned with his son to California where he, Painter, had grown up. For several months he kept Mark with or near him while he attempted to re-orient his life and at the same time earn a living. However, his working hours were

erratic, there was no woman in the home to look after his son, and arrangements for Mark's care outside the home were not satisfactory.

Therefore, in the summer of 1963 Harold Painter turned to the boy's maternal grandparents, Mr. and Mrs. Dwight M. Bannister, the respondents here. At Painter's request they took Mark from California to their farm home near Ames, Iowa, there to care for him until Painter was in a position where he felt he could attend properly to the rearing of his son.

Harold Painter remarried in November 1964 and with his wife established a new home in Walnut Creek, California. At the end of the 1964-65 school year, during which Mark was in the first grade, Painter and his wife went to Ames to bring Mark back to California with them. The Bannisters refused to let the boy go. The record indicates that at least Mr. Bannister harbored the intention of keeping Mark permanently at the time the grandparents took him to Ames on an ostensibly temporary basis.

Painter then filed a petition for habeas corpus. After a hearing on the petition the trial court awarded custody of Mark to his father. The Bannisters appealed. The Iowa Supreme Court expressly affirmed the trial court's finding that Painter was not unfit and its further finding that the arrangement for the care of Mark by the grandparents was intended to be a temporary one. Despite this the court reversed the judgment of the trial court and awarded custody to the grandparents. The court acted upon its judgment of what would be for Mark's best interests. It concluded that Harold Painter's "way of life"—which it characterized with words like "Bohemian," characterizations based on findings that Painter, *inter alia,* was

"either agnostic or atheist" and a "political liberal"—would not offer as much "stability or security" as the grandparents' household. The court relied heavily upon the testimony of a psychologist retained by the Bannisters who had never seen the Painters or their home but who nevertheless felt able to predict that there was a 90 per cent chance that Mark would "go wrong" if he were moved from the Bannister home to the Painter home.

That, in brief, is the story of this case. Some of the details follow. The facts recited give rise to the questions whether the Iowa Supreme Court has unconstitutionally deprived Harold Painter of the precious right to care for and rear his own son and has unconstitutionally deprived Mark of the equally precious right to be reared by his own father.

Harold Painter is 35 years old. He was born in California and has lived the greater part of his life in San Francisco and the San Francisco Bay Area. His parents were divorced when he was very young, and he was reared by foster parents, Mr. and Mrs. Leo B. McNelly, from the time he was two and one-half. (R. 23, 177, 212). He attended schools in San Francisco. In high school his strong interest and ability in practical subjects led to high grades in shop work, but he flunked out because at that time he was indifferent to academic courses he was required to take. While in school he engaged heavily in sports, and he was active in the Boy Scouts and Sea Scouts from the age of nine. (R. 25-26, 178-79, 209). At seventeen he joined the Navy and served for four years. (R. 25, 28-29, 182). Stationed in Hawaii, he spent his spare time hiking and sailing. He was able to read and to fulfill for the first time a desire to write

that he had had since he was fourteen. He decided to go to college when he left the Navy. (R. 29-30).

Soon after his honorable discharge he entered San Francisco City College, a junior college. He completed the two-year course there, receiving his high school diploma in the meantime, and went on to San Francisco State College, a four-year school. (R. 30-32, 182-83). He had high marks, mostly A's. (R. 31, 33). At each school he was a feature writer for the college newspaper and editor of the college literary magazine, though the magazine at San Francisco State never went into publication because it lacked funds. (R. 33). After more than a year at San Francisco State, he had exhausted the offerings in his English major and had taken some graduate work. He decided that the best thing to do if he was going to be a writer was to get practical experience on a newspaper. (R. 33-34). He left college and went to work for a small paper in the State of Washington. (R. 34-35). A succession of newspaper and other writing jobs followed. (R. 35, 42-44, 46, 62). Increasingly, his aspiration was to become a free-lance writer and photographer. (R. 42, 49, 58-59, 62).

While he was working for the Anchorage, Alaska, Times in 1957, he met Jeanne Bannister, who had come to Anchorage and a job as society editor of the Times from her home in Iowa after graduation from Grinnell College. They were married in April of 1957. (R. 35-37, 478). Jeanne Painter quit her job a month after the marriage. (R. 38). Mark was born on March 4, 1958, in Anchorage. (*Ibid.*)

The family left Alaska in 1959 at a time when Harold Painter was city editor of the Times. (R. 35, 42-43). He worked on newspapers in the State of

Washington and then went to work in July 1960 as editor and art director of the career publications program of Washington State University. (R. 42-46). The Painters lived in Pullman, the seat of the university. (R. 46). Painter left this job, at his employer's request, in August 1962. There were differences of opinion between Painter and his supervisor about matters of style and the like, and Painter thought that an incident involving his defense of the American Civil Liberties Union in a faculty bulletin, which he edited, also contributed to his being asked to leave. (R. 49-50, 343-66; Def. Exs. 35, 36).

Forced at that point to take stock of their lives, Painter and his wife determined that he should apply himself seriously and full-time to his free-lance writing. (R. 50-52, 255-57). To permit him to do this Jeanne Painter took a job with a newspaper in nearby Moscow, Idaho. (R. 48, 51). It was the first time since she quit her job in Anchorage after her marriage that she had worked, otherwise than part-time at home clipping and rewriting local newspaper stories for metropolitan papers. (R. 38, 44, 46-47, 48).

This was the situation when in December 1962 Jeanne Painter and little Janet Painter, who had been born to the couple on June 8, 1959 (R. 42), were killed in an automobile accident. As a result of the tragedy, Painter was, as he testified, "in a state of shock," which "continued in varying degrees for quite a while." (R. 53-54, 188-89). After affairs were attended to in Pullman, Harold Painter returned with Mark to California in February 1963. (R. 57, 59). They stayed for a short time with the McNellys, Harold Painter's foster parents, in Santa Rosa and then moved to nearby Glen Ellyn, where Painter at-

tempted for three months to pursue his free-lance writing and photography. (R. 59-60). Painter had bought a boat; he and Mark went sailing and fishing in San Francisco Bay on weekends. (R. 60-61). In Painter's words, "We felt like we were raw around the edges. Yes, we wanted to relax .... This was a darned good way to have a whale of a good time and forget a few things." (R. 61). Mark, then five, learned to fish and to sail a boat; in time he was able to steer the boat across the Bay. (*Ibid.*)

Painter's free-lancing venture was not successful. In June or July of 1963 he took a full-time job with the Contra Costa Times, a daily newspaper. (R. 62). His assignment entailed a good deal of night work, and he sent Mark to stay with the McNellys. (R. 62-63, 190-91). The conditions in the McNelly household did not prove satisfactory to Painter, however. (R. 65-66). In July 1963, still affected by his wife's death, unable properly to care for Mark himself because of the demands of his job and unwilling to leave the child to a babysitter, he took advantage of an offer to care for Mark that had been made by the Bannisters, his late wife's parents, soon after her death. He testified that he "felt Mark would be better off with the Bannisters because they were educated, sensitive people." He had admired as well as loved one of their four daughters and thought that "if they could have done so much for her, they could probably do as much for Mark." He therefore asked the Bannisters to come and take Mark back to Ames with them. (R. 66-67). It was his clear understanding—and he so explained to Mark—that they would care for Mark temporarily, only until Harold Painter again felt able to care for his son himself. (R. 67-70, 71, 194-95).

Thus, in July 1963, a few months after turning five, Mark went to Ames to stay with his grandparents. In the ensuing months Harold Painter kept in touch with his son by telephone calls and by letters to him and between Painter and the Bannisters. He sent Mark gifts and several poems he wrote especially for his son. (R. 72, 74, 76, 199; Pl. Exs. A, B, C, D; Def. Exs. 15, 21, 22, 26, 27, 28, 31, 32, 33, 34).

Until June 1964 everything proceeded smoothly. Painter's assumption was still that the boy was with the Bannisters temporarily. (R. 76-77). At that time Painter had a disturbing telephone conversation with Dwight Bannister. Painter had become engaged to Marylyn Hansen. In anticipation of his forthcoming marriage he suggested to the Bannisters that it might be appropriate for Mark to return to California before the beginning of the 1964-65 school year. Bannister said that he thought Mark should stay in Iowa and not return to California. (R. 77-80). According to Painter's testimony, Bannister "said the California situation was an unhealthy one and that he had written to my employers and friends, and that they had said derogatory things about me." (R. 80). Painter pressed for an explanation of what Bannister meant, but none was forthcoming. Bannister concluded, ominously, with a suggestion that the matter might be put up to the courts of Iowa to decide. (R. 80, 154).

In September 1964 Painter went to Ames. (R. 82). By this time he had fixed upon November as the date of his wedding, and he was willing that Mark not return home until a convenient breaking point in his school year, either February or June of 1965. (R. 83-84). He presented Bannister with a document to

this effect, which Bannister angrily tore up. (R. 87, 89, 507; Pl. Ex. E).

Painter was married to Marylyn Hansen on November 28, 1964. (R. 150). She is a Phi Beta Kappa graduate of the University of California with a Master's degree from San Francisco State. (R. 151). She had been a recreation worker, both part-time, during college, and full-time. She worked as a playground director in Oakland and had for some years worked for the Red Cross in hospitals in Oakland and in Japan and Korea. (R. 151-52). After she married Harold Painter, she left her job and began preparing their home in Walnut Creek for Mark's return. (R. 91, 152). Painter at that time was working on the copy desk of the Oakland Tribune. (R. 82). (He has since taken a job as a photographer at a Job Corps camp in Pleasanton.)

In February 1965 Painter again raised with the Bannisters the question of Mark's return to his home (Pl. Ex. C), but they were evasive. Yielding to his wife's urging that attempts be made to settle the matter amicably, he did not press the question at that time. (R. 95, 156-57). Then, in June, the Painters went to Ames. On this occasion they were told definitely and flatly by the Bannisters that they would not give Mark up. (R. 96-102). The Painters, having consulted counsel, then went to the school Mark was attending and took steps to take him away. (R. 102-04, 164, 166). When the school authorities intervened and called the Bannisters, the Painters desisted rather than use anything resembling force to assert Painter's unquestionable right to return his son to his home. (R. 104-06, 169).

The present lawsuit followed, initiated by Harold Painter's filing a petition for habeas corpus to reclaim

his own child from the youngster's grandparents. (R. 106, 108).

Evidence received at the hearing on the petition made it clear that the Bannisters were acting in bad faith at least from the time Painter called for their help in a time of need and perhaps from an earlier date. At the time of Jeanne Painter's funeral the Bannisters had urged Painter to let them take care of Mark temporarily (and perhaps to stay with them himself—the accounts of events of that time are not altogether consistent) while he attempted to readjust following his wife's death. (R. 64, 561-62, 571). Bannister harked back to the pioneers, who, he said, made it a custom to "leave their young ones, or even their wives, with the grandparents and for the young men to strike out and make a new home." (R. 64-65, 571). Very soon after that Bannister, for reasons that he claimed did not include laying a basis for challenging Painter's fitness but that he was unable to explain at all satisfactorily, was writing letters to friends and former employers of Painter, asking for information about him. (R. 508, 561). Replies to these letters purportedly were the basis for Bannister's statement in June 1964 that he had received derogatory information about Painter. (R. 80). (In fact, only one such reply appears of record in this case. [Def. Ex. 36].)[1]

[1] The author of that reply, Henry Grosshans, was a witness. (R. 342). He testified that he was University Editor at Washington State University. Harold Painter had worked for him but had been asked to leave. (R. 343-44). Mr. Grosshans' testimony made it clear that the chief reason was the incompatibility of Painter's newspaper background and style with the quite different style called for in university publications. (R. 345-47). Mr. Grosshans testified, in illustrating some of these differences in style, that "this is somewhat idiotic because they are pedantic small points" and "picayunish" and that he was "embarrassed" about raising them. (R. 352-53).

Bannister testified that he had made a decision about Mark while he was in Pullman for Jeanne Painter's funeral. The decision quite clearly was that the only proper home for Mark was with the grandparents. (R. 557-58). Bannister testified that when the grandparents took Mark, ostensibly on a temporary basis, in July 1963, "I would not have been willing to return Mark to him [Painter] at any time he wanted him." (R. 562). The trial court said that "it appears to the Court that the defendants [the Bannisters] had wanted the custody of their grandson, Mark, since the death of their daughter . . . ." (R. 580, p. 19a, *infra*).

Although Mrs. Bannister testified initially that at the confrontation in June 1965 the grandparents were willing to listen to the Painters and decide whether they could conscientiously let Mark go with them, she changed her testimony overnight, and her final sworn statement was that they would not have been willing to let Mark go no matter how much they might have been impressed with Marylyn Painter or by any change they saw in Harold Painter. (R. 508-09, 515-17). They had done nothing to prepare Mark for a return to his father. (R. 499-500). Mrs. Bannister was forthright on this point. "There was no occasion to tell this boy about these [good qualities of his father], and I could not have made such an occasion. I never made any attempt in any way to tell him about his good qualities." (R. 499). Bannister said of Painter, "I can't say that I like this little guy. He is helpless himself. He had defects. If he would give anybody a chance to help him he might not be completely worthless, but as it is now there is no reaching him. We

have no hope." (R. 561).[2] Bannister was distrustful of Painter and kept him under constant surveillance when he was visiting with his son. Painter testified poignantly that he and Mark finally had to climb a

[2] The Bannisters' distorted view of a man whom they barely knew but whom they obviously considered unworthy of their daughter showed up in other ways. They alone testified that Painter's first marriage was not a happy one. (R. 496, 500-02, 560). All the other evidence and the trial court's finding (R. 576, 580, pp. 16a, 19a, *infra*) were to the contrary. (See, *e.g.*, Pl. Ex. F). A social worker, whose information could have come only from the Bannisters, wrote in a report that during the five years of his first marriage Painter "held several different jobs" and "was fired from three of these" and that "for a number of years" Harold Painter free-lanced and made so little money that Jeanne Painter "had to hold a full-time job to support the children adequately." (Ct. Ex. 2). The statements are not true. Painter held four jobs in the period, left two because he was dissatisfied or wanted to try something else, left a third because there was no more job for him, and left the job at Washington State University under circumstances described above. (R. 42-44). Painter free-lanced for a few months, which was the only period of their marriage in which Jeanne Painter worked full-time.

Bannister's description of these events was equally slanted. He said that Painter "decided he wasn't going to do any more work. He was going to do free-lancing. One morning I was with him there and he had a telephone call about a job he was to have taken, but he made a call to the effect that he did not want the job. At the time he was out of work because he had been fired from his job over at Pullman, and this man instead of helping his wife, told his wife to go work for herself, take care of her children, which she did." (R. 559).

Despite the fact that in her will executed in August 1962 Jeanne Painter had said that she had made no specific provision for her children if her husband survived her "as I am confident that he will faithfully provide for their care and I wish him to have unfettered power to do so" (R. 15), the Bannisters persisted in their stated belief that she would have wanted them to take care of Mark in preference to Mark's own father. (R. 511-12).

tree in order to have a few moments alone together during the September 1964 visit to Ames. (R. 85).

All of this appeared of record in the habeas corpus proceeding, but it made up only a small part of that record, most of which was devoted to the issue of the fitness of Harold Painter. His life was examined microscopically. Detectives investigated him. (R. 580, p. 19a, *infra*). A psychiatric examination—which showed him to be normal—was arranged. (R. 113, 496-98; Pl. Ex. M). He and his wife, family, friends and a former employer were questioned at length on the record. (R. 23-375). Much more routinely and briefly, the Bannisters and some persons who had had contact with Mark in Ames also testified. (R. 383, 476, 522, 533, 537, 544, 549, 553, 555). There was lay testimony that, quite naturally, Mark was upset when he came to Ames but had adapted well and, enjoying high basic intelligence, was now a lively, interested, pleasant little boy. (R. 385-86, 397-99, 485-87, 503, 523-25, 532, 533, 537, 544-45, 549).

There was in addition the testimony of Dr. Glenn R. Hawkes, a child phychologist retained by the Bannisters. (R. 403). He testified on the basis of 25 hours of examination of the Bannisters and Mark. (R. 408-09). His examination of Mark included psychological tests and so-called "depth interviews." (R. 409-10). He administered and conducted these without, so far as the record shows, obtaining the consent of the boy's father. He did not see the Painters at all professionally or visit their home, and to him this did not matter. (R. 441, 471). The gist of his testimony was that Mark had established a relationship with the Bannisters and that it would be a bad thing for him to move anywhere at this stage of his life, even if Mark's

father were a "paragon of virtue." (R. 429-34, 441-42, 471). He discounted altogether the importance of the "biological" father, saying that the "psychological premise" on which he operated in this case is that "the biological father is an accident of conception in many cases"—in spite of the fact, which he acknowledged, that Mark had spent most of his life with his "biological" father. (R. 426-27, 442-43, 444). When pressed, Dr. Hawkes even made the astounding prediction that were Mark to be moved—even presumably to a household exactly like that of the Bannisters—there was a 90 per cent chance that he would "go wrong." (R. 445, 448).

Having heard all of this, the trial judge found unhesitatingly that Mark should be returned to his own father. He said that the arrangement by which Mark went to Ames was on "entirely a temporary basis and would continue until the plaintiff [Painter] became settled in his own home with facilities to care for the minor son." He found that Painter was "a proper and fit person to have the care and custody of his own minor son" and that it would be for Mark's best interest "to be reared and educated in his own father's home . . . ." The trial judge found himself unable to accept the testimony of Dr. Hawkes "at full face value because of exaggerated statements and the witness' attitude on the stand." As for Mark, whom he interviewed in private, he found him "a physically well developed boy . . ., considerably above average in mental abilities, pleasant, courteous and well behaved." He had had problems when he first came to Ames but they were "none other than that of a normal child of that age." The judge found it apparent "from the evidence adduced . . . that Mark has many of his

father's characteristics and exhibits a great deal of the good early training given him by his beloved mother." (Pp. 17a-20a, *infra*).

The Bannisters appealed. On appeal the Iowa Supreme Court agreed with the trial court that Painter was fit and had not abandoned or otherwise relinquished his rights to custody of his child—that the arrangement for the care of Mark by his grandparents was intended as a temporary one. Nevertheless the Iowa Supreme Court, though disclaiming the intent to do so, engaged in a comparative evaluation of the Bannister and Painter households and ways of life to arrive at its own judgment of how Mark's best interests would be served. In evaluating Mark's father the court took particular note of the facts that he is an agnostic or atheist who has read some Zen Buddhist literature and that he is a political liberal and sometime defender of the American Civil Liberties Union. It regarded him as "Bohemian" and "romantic," noting that he prefers self-employment to working for a salary, that there are weeds in his front yard, and that he prefers natural wood to paint on his house. The court said the Painter household was "probably intellectually stimulating" but it expressed a strong preference for "security and stability" for a child. The court did not mention—or evaluate on its "security and stability" yardstick—Painter's testimony that the single most important feature of a home where a child is growing up is the love the parents have for the child. (R. 65, 138). It overrode the trial court's healthy skepticism of Dr. Hawkes' bizarre testimony and placed great reliance upon it. On the basis of that testimony and its preference for the "conventional, middle-class, middlewest background" it felt the Ban-

nister household would provide, it awarded custody of Mark to his grandparents. (Pp. 3a-13a, *infra*).

The federal questions presented here were first raised in a petition for rehearing of the Iowa Supreme Court's decision. (R. 602-88). Until that decision the Iowa Supreme Court had never deprived a natural parent, found to be a fit parent who had not abandoned his child, of custody of that child; and certainly not for reasons that included the parent's religious and political beliefs, and on the basis of testimony of a single psychologist whose conclusions are "neither representative nor typical" of child psychologists[3] and are flatly contrary to human experience. The petition also invited to the court's attention the fact that, although the ostensibly good health of the 60-year-old Bannisters was a factor in awarding them custody of Mark, Mr. Bannister retired from his job "for health reasons" four days after the court's decision was announced,[4] having testified six months earlier that it would be ten years before he expected to retire. The petition for rehearing was denied. (R. 938).

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[3] The quotation appears in a letter from Dr. Paul R. Dingman, Director of the Des Moines Child Guidance Center, commenting upon Dr. Hawkes' testimony and the Iowa Supreme Court's reliance on it. In the letter, which was appended to the petition for rehearing, Dr. Dingman recommended a remand for the taking of additional expert testimony, as did Lawrence H. Scales, Jr., Executive Director of the Iowa Children's Home Society, whose letter was also appended to the petition for rehearing. (R. 678-82).

[4] This information appeared in a newspaper story in the Ames Daily Tribune, Feb. 12, 1966, attached to the petition for rehearing. It is confirmed by another attachment, a letter from Mr. Ned Disque, Associate Director of Information Services at Iowa State University, where Mr. Bannister had been employed. (R. 683-85).

REASONS FOR GRANTING THE WRIT

This case raises important questions as to the extent of a state's power to invade the privacy of a family and destroy a family relationship. If allowed to stand, the decision below would effect a radical change in the relation between the family and the state that would pose a serious threat to the privacy, security and integrity of innumerable families in the United States.

1. (a) The court below has deprived a father, found to be a fit parent and found not to have given up his parental rights, of the custody of his son and has deprived the son of the care and attention of his father because it thinks that it would be in the best interests of the child that others, estranged from the father and many miles from him geographically, should have custody of the child.

The precise question whether a court or any other agency by which state power is exercised may do what the Iowa Supreme Court has done here has never been decided by this Court. Limitations on state power to interfere with family relationships have been prescribed in prior decisions of the Court. They foretell a negative answer to the question. This case presents an ideal opportunity for making explicit what we submit is clear from this Court's prior decisions.

It is a firmly established principle of constitutional law that there is a "private realm of family life which the state cannot enter." *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). When the states undertake to intervene in family relationships, they trench upon "one of the basic civil rights of man." *Skinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942). Among the constitutionally protected interests within the private realm of family

life is the interest of a parent in having the "care, custody, management and companionship" of his own child and directing the child's upbringing. *May* v. *Anderson,* 345 U.S. 528, 533 (1953); see *Selman* v. *Phillips,* 384 U.S. 210 (1966); *Armstrong* v. *Manzo,* 380 U.S. 545 (1965); *Prince* v. *Massachusetts, supra; Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). Parental rights to the custody, care and companionship of a child are "far more precious . . . than property rights." *May* v. *Anderson, supra.* The correlative right of a child to have the affection, care and attention of his own parent is also worthy of constitutional protection.

Meyer v. *Nebraska, supra,* is the foundation case. There the Court held unconstitutional a state statute forbidding the teaching of languages other than English below the ninth grade. In doing so, the Court stated that the liberty protected by the due process clause of the Fourteenth Amendment

> "denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399.

Two years later the Court invalidated under the Fourteenth Amendment an Oregon statute requiring all children to attend public schools. *Pierce* v. *Society of Sisters, supra.* In doing so, it emphasized again the fundamental liberty of parents that is beyond the

reach of the state. The Court said that the statute at issue

> "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 534-35.

In *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), the doctrine established by these cases was distilled in the passage from which we have quoted at page 18 above. The Court there, having referred to *Meyer* and *Pierce,* said in fuller context:

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Id.* at 166.

The principle of these cases remains vital. That is demonstrated by the Court's opinion and the concurring opinions in *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). Each of the opinions written in support of the Court's decision that Connecticut's statutes banning the use of contraceptives were unconstitutional explicitly or by reference cited to *Meyer* and *Pierce.*[5]

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[5] See the opinion of the Court, 381 U.S. at 482-83; concurring opinion of Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Brennan, *id.* at 488, 495; concurring opinion of Mr. Justice Harlan, *id.* at 500, referring to his dissenting opinion in Poe v. Ullman, 367 U.S. 497, 543-44, 552 (1961); and concurring opinion of Mr. Justice White, 381 U.S. at 502. *Cf.* Poe v. Ullman, *supra,* at 515-18 (Mr. Justice Douglas, dissenting).

Each of the opinions reaffirmed the constitutional sanctity of the family relationship and its guaranteed freedom from unjustifiable state interference. Differences among the opinions concerned the doctrinal basis of that sanctity and guaranteed freedom. Whether the family relationship, and particularly the relationship of parent to child, is protected because it lies "within the zone of privacy created by several fundamental constitutional guarantees"—those of the First, Third, Fourth, Fifth and Ninth Amendments, 381 U.S. at 485; whether it is protected as an aspect of the freedom of association guaranteed by the First Amendment, or whether it is protected as simply within the liberty guaranteed against state incursions by the due process clause of the Fourteenth Amendment,[6] Iowa by its action here has not respected its sanctity.

(b) The states have broad powers to safeguard the welfare of children within their borders. In the exercise of those powers they may sometimes override parental prerogatives, as in the enforcement of child labor laws. See *Prince* v. *Massachusetts,* 321 U.S. 158 (1944). Under juvenile delinquency and juvenile court statutes the states may remove or otherwise protect children from neglectful parents.

There is no legitimate state interest to be served, however, by removing a child from the care of a fit parent who wishes and intends to fulfill and is capable of fulfilling the obligations of parenthood. Thus, in

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[6] In Armstrong v. Manzo, 380 U.S. 545, 550 (1965), this Court held a father entitled by the due process clause to notice of a proceeding to adopt his son because "the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies." See also Selman v. Phillips, 384 U.S. 210 (1966); Stubbs v. Hammond, 135 N.W. 2d 540, 543 (Iowa 1965).

the case of a dispute over custody between a parent and non-parent a child may be removed from the parent only if the parent is unfit or by agreement or by conduct manifesting abandonment has thrown up his parental rights and obligations.[7] Only then is there the requisite "substantial justification" for entering the constitutionally protected "realm of family life," see *Griswold* v. *Connecticut*, 381 U.S. 479, 502 (1965) (Mr. Justice White, concurring).

Even when dressed up in the legal Latin of *parens patriae* a state's power to protect children does not include a roving commission to determine what custody or guardianship will best serve the interests of every child within its borders. *Cf. Meyer* v. *Nebraska*, 262 U.S. 390, 401-02 (1923). In *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), counsel argued that "as to minors, the state stands in the position of *parens patriae* and may exercise unlimited supervision and control over their contracts, occupation and conduct,

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[7] This principle is subject to one possible qualification not relevant here. Some courts have not unnaturally tended to regard parental rights as considerably diminished in importance where there has been a divorce and an award of custody to, or assumption of custody by, a parent now deceased, and the surviving parent then attempts to claim custody as against the person who has succeeded to the deceased parent. Even in the case of divorce the general rule is that where custody is awarded to one parent and that parent subsequently dies, the surviving parent will be awarded the custody unless unfit. See Annot., 128 A.L.R. 989. The constitutional basis for such a rule in cases involving divorce may be substantially less compelling, however, because of the voluntary relinquishment by the parents of the family's claims to privacy and continued existence as a legally protected entity. In the present case, of course, the surviving parent disputing custody with others has not himself participated in the dissolution of his family by giving grounds for or suing for divorce.

and the liberty and right of those who assume to deal with them." *Id.* at 512. The Court rejected this argument.[8]

In this case there was no such unfitness of a parent or abandonment of a child by a parent as might justify an award of custody to others. The Iowa Supreme Court found specifically that it was "not confronted with a situation where one of the contesting parties is not a fit or proper person." It found that "there is no suggestion in the record that Mr. Painter is morally unfit," and, speaking of Painter, it said that "an individual is free to choose his own values, within bounds, which are not exceeded here." Finally, it found "no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement." (Pp. 5a, 8a, *infra*). Under Iowa law as it stood prior to the decision in this case such findings would have led inevitably to an award of custody to the natural parent.[9]

The prior law of Iowa accords with the law generally applied in most of the jurisdictions of the United

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[8] This Court recently pointed out that "the admonition to function in a 'parental' relationship" contained in a juvenile court act that makes the state "*parens patriae* rather than prosecuting attorney and judge" "is not an invitation to procedural arbitrariness." Kent v. United States, 383 U.S. 541, 555 (1966).

[9] Watters v. Watters, 243 Iowa 741, 744, 53 N.W.2d 162, 163 (1952); Joiner v. Knieriem, 243 Iowa 470, 479, 52 N.W.2d 21, 26 (1952); Wooley v. Schoop, 234 Iowa 657, 660, 12 N.W.2d 597, 599 (1944); Van Auken v. Wieman, 128 Iowa 476, 104 N.W. 464 (1905).

States.[10] In some of these the constitutional dimensions of the rule that a fit parent who has not abandoned his child is entitled to the custody of the child as against strangers have been explicitly recognized. Among these states are California, Minnesota, Nebraska, New York and Rhode Island.[11] The Court of Appeals for the District of Columbia Circuit has declared:

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[10] See, *e.g.*, Griggs v. Barnes, 257 Ala. 21, 57 So. 2d 61 (1952); McLendon v. Pelt, 208 Ark. 287, 185 S.W.2d 931 (1945); Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944); Turner v. Hunter, 142 Colo. 129, 350 P.2d 202 (1960); In re Stuart, 114 F.2d 825 (D.C. Cir. 1940); Meyers v. Shifrin, 146 So. 2d 770 (Fla. App. 1962); Schiller v. Douglas, 48 Idaho 803, 285 Pac. 1021 (1930); People ex rel. Buell v. Bell, 20 Ill. App. 2d 82, 155 N.E.2d 104 (1959); Kirkum v. Kasprzak, 242 Ind. 198, 177 N.E.2d 459 (1961); Stout v. Stout, 166 Kan. 459, 201 P.2d 637 (1949); In re Kailer, 123 Kan. 229, 255 Pac. 42 (1927); Stapleton v. Poynter, 111 Ky. 264, 62 S.W. 730 (1901); Brown v. Ellison, 162 So. 2d 805 (La. App. 1964); McClary v. Follett, 226 Md. 436, 174 A.2d 66 (1961); In re Mathers, 371 Mich. 516, 529, 124 N.W.2d 878, 884 (1963); In re Alsdurf's Petition, 270 Minn. 236, 133 N.W.2d 479 (1965); In re M—L—J, 356 S.W.2d 508 (Mo. App. 1962); Raymond v. Cotner, 175 Neb. 158, 120 N.W.2d 892 (1963); Application of Anonymous, 10 Misc. 2d 1076, 170 N.Y.S.2d 178 (1958); Browning v. Humphrey, 241 N.C. 285, 84 S.E.2d 917 (1954); In re Gary, 112 Ohio App. 331, 167 N.E.2d 509 (1960); Gibson v. Dorris, 386 P.2d 186 (Okla. 1963); Simons v. Smith, 229 Ore. 277, 283, 366 P.2d 875, 878 (1961); Commonwealth ex rel. Insalaco v. Deleonte, 301 Pa. Super. 354, 192 A.2d 750 (1963); Skeadas v. Sklaroff, 84 R.I. 206, 122 A.2d 444 (1956), *cert. denied*, 351 U.S. 988 (1956); Blow v. Lottman, 75 S.D. 127, 59 N.W.2d 825 (1952); Sherry v. Doyle, 68 Utah 74, 82, 249 Pac. 250, 253 (1926); In re Hudson, 13 Wash. 2d 673, 693-95, 126 P.2d 765, 775 (1942); Whiteman v. Robinson, 145 W. Va. 685, 694-95, 116 S.E.2d 691, 696 (1960).

[11] See Odell v. Lutz, 78 Cal. App. 2d 104, 106, 177 P.2d 628, 629 (1947); State ex rel. Nelson v. Whaley, 246 Minn. 535, 547, 75 N.W.2d 786, 794 (1956); Norval v. Zinsmaster, 57 Neb. 158, 161-62, 77 N.W. 373, 374 (1898); People ex rel. Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952); Skeadas v. Sklaroff, 84 R.I. 206, 210, 122 A.2d 444, 446 (1956), *cert. denied*, 351 U.S. 988 (1956).

"Under our constitutional system, the citizen has more than a revocable privilege to possess and to rear his children. Under our theory of government there is recognized as inherent in parents a right to maintain the custody and to direct the upbringing and education of their own offspring. True, this right is not absolute. If parents treat their children with cruelty or neglect, or are unfit in character or mode of life suitably to control their associations and upbringing, the state for the welfare of the child and society may interfere. But rights guaranteed by the constitution are not to be qualified either by legislation or judicial action having no reasonable relation to some purpose within the competency of the state. In respect of the liberty of parents to direct the upbringing and education of their children see Pierce v. Society of Sisters . . . ." *In re Stuart*, 114 F. 2d 825, 832 (D.C. Cir. 1940).[12]

(c) In some states confusion has been introduced into cases in which a parent contests custody with a non-parent by uncritical judicial use of the broad statement that in custody disputes the governing consideration is the best interests of the child.[13] Even in

[12] See also Bell v. Leonard, 251 F.2d 890 (D.C. Cir. 1958).

[13] State ex rel. Guinn v. Watson, 210 La. 265, 270, 26 So. 2d 740, 742 (1946); Ross v. Pick, 199 Md. 341, 350, 86 A.2d 463, 468 (1952); Walker v. Williams, 214 Miss. 34, 42, 58 So. 2d 79, 81 (1952); State ex rel. Veach v. Veach, 122 Mont. 47, 52-53, 195 P.2d 697, 700 (1948); Ex parte Schultz, 64 Nev. 264, 268-69, 181 P.2d 585, 587 (1947); Pendergast v. Titus, 95 N.H. 191, 192, 60 A.2d 122, 123 (1948); In re Mrs. M., 74 N.J. Super. 178, 186, 187, 181 A.2d 14, 18 (1962); State ex rel. Day v. Parker, 55 N.M. 227, 230, 230 P.2d 252, 254 (1950); Williams v. Rogers, 224 S.C. 425, 428, 79 S.E.2d 464, 465 (1954); Sweeney v. Joneson, 75 S.D. 213, 216, 63 N.W.2d 249, 251 (1954); Holloway v. Bradley, 190 Tenn. 565, 571, 230 S.W.2d 1003, 1006 (1950); Ueckert v. Ueckert, 373 S.W.2d 370, 372-73 (Tex. Civ. App. 1963); Morris v. Jackson, 66 Wyo. 369, 379-80, 212 P.2d 78, 82 (1949).

these states the result of the cases, as opposed to the language used, is very seldom the destruction of a natural parent-child relationship in the absence of unfitness or abandonment.

The best-interests test is properly invoked in those unhappy cases where two parents, divorcing or separating, are contesting for the custody of their child or where an orphan or abandoned child is the subject of a custody dispute between two persons neither of whom is his parent. In such cases a comparative examination of what the contending parties have to offer the child and what result will be in the child's best interests is the only rational method of decision.

There is no occasion for such an examination in the case of a dispute between a parent and a stranger, once the parent is found fit and found not to have abandoned his child. This is simply a matter of allocation of the power of decision. Under our system decisions as to what will best serve the interests of children are generally made by fit parents, not by the state. Mr. Justice (now Chief Justice) Traynor of the California Supreme Court has explained the point aptly. He said that "the rule requiring that custody be awarded to [a fit] parent in preference to a stranger does not operate to subordinate the interests of the child to those of the parent; it merely serves to define the area of the parent's responsibility for the welfare of the child." For "if a parent is fit he will be vitally concerned with the best interests of the child. By leaving to him the responsibility as to how those interests will be best served the court simply recognizes that 'it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state

can neither supply nor hinder . . . .'" *Guardianship of Smith,* 42 Cal. 2d 91, 97, 265 P. 2d 888, 891-92 (1954) (concurring). Even among courts that profess to use the best-interests test in all custody cases, the results in all but a handful of cases are consistent with this view.[14]

Dicta are frequent suggesting that even in a parent-stranger case the best-interests test demands a comparative evaluation of those disputing custody, however, and occasionally a court has been so bemused by them that it has denied a fit parent's claim to custody of a child that he had not abandoned to a stranger.[15] The dicta have, moreover, led the Section of Family Law of the American Bar Association to propose a model custody statute that in relevant part would read as follows:

> "Custody may be awarded to persons other than the father or mother whenever such award serves the best interests of the child. Any person who

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[14] See Foster v. Sharpe, 114 So. 2d 373 (Fla. App. 1959); In re Mrs. M., 74 N.J. Super. 178, 181 A.2d 14 (1962); Sweeney v. Jonson, 75 S.D. 213, 63 N.W.2d 249 (1954); Holloway v. Bradley, 190 Tenn. 565, 230 S.W.2d 1003 (1950); Ueckert v. Ueckert, 373 S.W.2d 370 (Tex. Civ. App. 1963); Harrison v. Harker, 44 Utah 541, 142 Pac. 716 (1914). For a case in which a parent whom the record showed clearly to be unfit was denied custody professedly on the basis of the best-interests test, see Giacopelli v. Florence Crittenton Home, 16 Ill. 2d 556, 158 N.E.2d 613 (1959); compare McAdams v. McAdams, 46 Ill. App. 2d 294, 197 N.E.2d 93 (1964).

[15] See Don v. Frankel, 136 Conn. 441, 71 A.2d 713 (1950); Osburn v. Roberts, 197 Okla. 206, 169 P.2d 293 (1946) (compare Gibson v. Dorris, 386 P.2d 186 [Okla. 1963]); Commonwealth ex rel. Shamenek v. Allen, 179 Pa. Super. 169, 116 A.2d 336 (1955). See also Baram v. Schwartz, 151 Conn. 315, 197 A.2d 334 (1964) (prior dissolution of family by divorce); McKay v. Mitzel, 137 N.W.2d 792 (N.D. 1965) (same); King v. Shrum, 244 S.W.2d 720 (Tex. Civ. App. 1951) (same); see note 7, *supra.*

> has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody."[16]

The statute, which we submit is plainly unconstitutional in some of its apparent applications, has already been adopted by one state, Hawaii.[17] The thinking reflected by it and by the decision below carries a grave enough threat to the constitutionally protected sanctity of family relationships that this Court should take this matter in hand at this time.

(d) The dangers of engaging in a comparative evaluation of what the parties to a custody dispute between a parent and strangers have to offer the child are well illustrated by the facts of this case. Once a judge or anyone else considers himself free to decide where a child will be "best off," the temptation is overwhelming for him to favor the environment that he personally finds most congenial or that most resembles his own. The court below in effect established itself as the supreme guardian of the children within its jurisdiction, deciding on the basis of its own tastes, preferences and values which of them should be raised by their own admittedly fit parents and which by others thought better suited to direct their upbringing.[18]

The court proceeded from a statute providing that "the parents of a minor, or either of them, if qualified

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[16] ABA Section of Family Law, 1963 Proceedings, p. 38.

[17] Hawaii Sess. Laws, Act 83, § 1(2), at p. 74 (1965).

[18] "We are here setting the course for Mark Wendell Painter's future. . . . Legal training and experience are of little practical help in solving the complex problems of human relations." (P. 3a, *infra*).

and suitable, shall be preferred over all others for appointment as guardian."[19] The court referred to this as "the presumption of parental preference, which though weakened in the past several years, exists by statute." (P. 8a, *infra*). Although disregard by the court of a rule prescribed by its own legislature does not present a federal question, the arrogation of power by the court is instructive as to its attitude.

In making its determination of where the best interests of Mark Painter lay, the court below thought it relevant that Harold Painter preferred the challenge of self-employment to working for others for a salary; that, like many other married men, he has looked to his wife to handle the family finances; that there are weeds in his front yard and he likes his house as it is, unpainted; that his feeling for his first wife led him to hold a private funeral service, attended only by himself, and that he attended her public funeral dressed in a sport shirt and sweater. On the basis of these and other considerations that are treated in the next section of the petition the court reached its conclusion that in the Painter household Mark would be exposed to a life that was "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." By contrast, the Bannister home was described as providing Mark "with a stable, conventional, middle-class, middlewest background and an opportunity for a college education and profession, if he desires it." (Pp. 5a-8a, *infra*).

The fact that the court considered matters such as these, matters of attitude and of personal taste, as even

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[19] Iowa Code § 633.559, successor to Iowa Code §§ 668.1-.2. (Pp. 1a-2a, *infra*).

worthy of mention demonstrates the intense danger of a rule that allows an arm of the state to intrude its own beliefs and values into a custody contest between a parent and a non-parent. The court, it is true, entered a disclaimer in this regard. It said that "it is not our prerogative to determine custody upon our choice of one of two ways of life within normal and proper limits and we will not do so." (P. 5a, *infra*). But the action it took is inconsistent with the disclaimer it made. The court professed to be deciding what was best for Mark specifically, but there is nothing in the record to indicate that Mark had any special needs that would be met better by the idealized Bannister home that the court constructed than by the Painter household it saw depicted in the record. The court said that "were the question simply which household would be the most suitable in which to raise a child, we would have unhesitatingly chosen the Bannister home. We believe security and stability in the home are more important than intellectual stimulation in the proper development of a child." (P. 8a, *infra*). Not *this* child, note; but *any* child.

The court purported to find a basis for a conclusion that Mark particularly needed the stability of the Bannister household rather than the intellectual stimulation of the Painter household in the testimony of Dr. Hawkes, the psychologist who testified for the Bannisters. But Dr. Hawkes' testimony was that Mark needed a "stable," that is, unchanging, "father figure," not that he had a particular need for domestic "stability" of the kind that the court believed to characterize the Bannister household and not the Painter household. (R. 429-32, 441-43, 471-72). Two entirely different kinds of "stability" are involved and were

confused by the court in its opinion. Thus no support can be derived from Dr. Hawkes' testimony for the court's excursion into an intensely dangerous, and constitutionally prohibited, qualitative assessment of two different ways of life.

Moreover, in the court's rosy view of the Bannisters and their home it ignored factors that cast doubt upon their fitness to direct Mark Painter's upbringing. In disregarding these factors, it disserved children in whose best interests it would be to be placed temporarily in an Iowa home because of exigencies of their parents' situation. The court found that "there is no merit in the Bannister claim that Mr. Painter permanently relinquished custody. It was intended to be a temporary arrangement." (P. 8a, *infra*). On this finding the Bannisters were guilty of a gross breach of faith in refusing to return Mark to his father.[20] The court went on to say that "a father should be encouraged to look for help with the children from those who love them without the risk of thereby losing the custody of the children permanently." (*Ibid.*) But its decision belies the concern thus expressed. A widower who is, for example, called into the service will think long before doing what may be the best thing for his child by leaving him with relatives if he knows that those relatives may thwart his effort to resume his full parental privileges and obligations at some future date by persuading a judge or some other official that the child will be better off staying with them.

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[20] This is to say nothing of the trial court's belief, based upon the record, that from the time their daughter died the Bannisters wanted to keep Mark permanently. See p. 12, *supra*.

The court also disregarded the Bannisters' failure to foster in Mark the feeling for his father that any little boy should have. (See pp. 12-13, *supra*). It is unnatural enough that a child, found as Mark was by the trial court here to have "many of his father's characteristics" and who, as even the Iowa Supreme Court thought, "should be encouraged in every way possible to know his father," should be deprived of the care and attention of his father in the father's own home. It is even more unnatural that he should be left with persons who it is fair to infer will attempt to alienate him from his father.

2. The court below said that its "conclusion as to the type of home Mr. Painter would offer is based upon his Bohemian approach to finances and life in general," and that "we feel there is much evidence which supports this conclusion." Among the items of evidence that the court then proceeded to recite, in addition to those we have discussed above, were the facts that

> "Mr. Painter is either an agnostic or atheist and has no concern for formal religious training. He has read a lot of Zen Buddhism and 'has been very much influenced by it'. Mrs. Painter is Roman Catholic. They plan to send Mark to a Congregational Church near the Catholic Church, on an irregular schedule.
>
> "He is a political liberal and got into difficulty in a job at the University of Washington for his support of the activities of the American Civil Liberties Union in the university news bulletin." (P. 7a, *infra*).

If there is ever any room for a court or other organ of the state to deprive a fit parent of the custody of

his child, which we deny, it clearly cannot base such a deprivation in whole or in part upon the parent's political opinions and religious beliefs and expressions.

The First Amendment as made applicable to the states by the Fourteenth prevents a state from withholding a notary public's appointment because of an applicant's unwillingness to take a religious oath, *Torcaso* v. *Watkins,* 367 U.S. 488 (1961); and from withholding a tax exemption, *Speiser* v. *Randall,* 357 U.S. 513, 518-19 (1958); denying admission to the bar, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 239 (1957); or denying public employment, *Elfbrandt* v. *Russell,* 384 U.S. 11, 18 (1966), because of political beliefs or associations. *A fortiori,* a parent's right to custody of his child, "a personal right entitled to . . . protection," *May* v. *Anderson,* 345 U.S. 528, 534 (1953), cannot be denied because of the parent's religious beliefs or political views. State courts have recognized that custody awards cannot constitutionally be based upon the religious beliefs of one of the litigants. *Cory* v. *Cory,* 70 Cal. App. 2d 563, 568-74, 161 P. 2d 385, 389-92 (1945); *Jackson* v. *Jackson,* 181 Kan. 1, 9-10, 309 P. 2d 705, 711-12 (1957); *Salvaggio* v. *Barnett,* 248 S.W. 2d 244 (Tex. Civ. App. 1952), *cert. denied,* 344 U.S. 879 (1953).

The judgment is not saved by the court's statement that the facts it recited, including the facts concerning Painter's political views and religious beliefs, "are not related as a criticism of Mr. Painter's conduct, way of life or sense of values." Criticism or not, the considerations entered into the court's assessment of the Painter way of life, to which the court found the Bannister way of life preferable, and thus into the court's ultimate decision that custody of Mark should be

awarded to his grandparents. Such a decision is unconstitutional under the First and Fourteenth Amendments.

Nor is the decision below saved from this constitutional infirmity by the fact that the court placed "a great deal of reliance on the testimony of Dr. Hawkes," the psychologist retained by the Bannisters. The court was not willing to accept as an exclusive, independent ground of decision Dr. Hawkes' opinion, given without any professional examination of the Painters or their household, that it would be bad for Mark to be moved. After discussing the psychologist's testimony the court declared that "we know more of Mr. Painter's way of life than Dr. Hawkes," and that it had concluded, on the basis of all the considerations we have heretofore discussed, "that it [Mr. Painter's way of life] does not offer as great a stability or security as the Bannister home."

3. In any event, were the Hawkes testimony to be regarded as an exclusive, independent ground of decision, the decision of the court below would be unconstitutional, in violation of the Fourteenth Amendment, as resting in substance on no evidence at all. See *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957). For Dr. Hawkes' opinions that the biological parent of a child is of no importance, that it is irrelevant even to consider where a child may be moved in judging whether he should be moved, and that a child of Mark's age and history of adaptation to change has a 90 per cent chance of "going wrong" if his custody is changed, even by being restored to his natural parent with whom he has lived for most of his life, are so far contrary to human experience that they

must be discredited. They do not represent the opinion of the psychological profession generally or of others expert in matters of child care, as was demonstrated by us in our petition for rehearing below. Dr. Paul R. Dingman, Director of the Des Moines Child Guidance Center, stated after having read Dr. Hawkes' testimony that "other competent psychologists would have reason to disagree with the procedures, with the findings, and with the conclusions of Dr. Hawkes." (R. 679).[21] It would clearly be a denial of due process to rest a decision on testimony based upon those procedures and embodying those findings and conclusions.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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[21] Dr. Benjamin Spock, the renowned pediatrician, is quoted as believing that "the whole line of Dr. Hawkes' reasoning was 'preposterous, ridiculous.'" McCalls, May 1966, p. 168.